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DATE: FEBRUARY 28, 1997

CASE NO: 94-INA-571

In the Matter of

DP-TECH COMPUTERS INC.
Employer

on the behalf of

JATIN M. BHAVSAR
Alien

Before: Huddleston, Jarvis and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

ORDER OF REMAND

This case arises from DP-Tech Computer's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined or certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the

prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On November 12, 1992, Employer filed a Form ETA 750 Application for Alien Employment Certification with the New Jersey Division of Employment Services ("NJDES") on behalf of the Alien, Jatin M. Bhavsar. AF 5. The job opportunity was listed as Software Engineer and the basic rate of pay was amended to $47,300 per year. Id. The duties were described as:

> Analyze complex application oriented data to design & develop automated software tools. Devise methods & algorithms, acceptance testing. Conduct performance & acceptance testing of existing & newly developed software systems using standardized software testing methodologies. Id.

Employer's minimum qualifications included a M.S. in Computer Science, one year and five months of related experience as a Software Engineer and also listed the following special requirements:

> Related exp must involve C, SQL, ESZL/C, UNIX KORN SHELL, INGRES TROFF/TBL, UNIX internal kernal, AWK, S, relational database management systems. Knowledge of Algorithm design & development, statistical methods for problem solving, data modeling, frequency distribution, statistical plots & measures. Id.

The NJDES sent two resumes to Employer. AF 32. Employer submitted a Report of Recruitment which indicated that neither applicant had been hired. AF 26. The file was transmitted to the CO. AF 31. On March 28, 1994, the CO issued a Notice of Findings ("NOF") in which she proposed to deny certification. AF 37. First, the CO stated that another employer is located at the same address and phone number as in this case and requested clarification. AF 36. Second, the CO asserted that the job requirements were excessive and were restricted to the alien's background. Id. The CO stated that Employer could rebut by amending the requirements, and readvertise or document the business necessity of the requirements. AF 35-36. Third, the CO contended that Employer had not documented lawful, job-related reasons for rejecting the two U.S. applicants. AF 34. She noted that Employer required each applicant to take a programming test in UNIX and C when the job did not list any programming duties

and questioned good faith recruiting. Id.

Employer filed its rebuttal on May 6th, 1994. AF 38-54. The rebuttal included a letter from Employer's attorney which attempted to explain the business necessity of the requirements of the original job advertisement and demonstrate lawful job-related reasons for the rejection of applicant Joseph S. Fulda. Employer also offered to amend the application and readvertise if the CO found that the requirements were not adequately justified. AF 52-54. The rebuttal also provided a letter and two contracts from AT&T, one of its clients, which purported to explain the business necessity of the stated job requirements. AF 44-47. Employer further included various advertisements for software engineers with similar job requirements. AF 39-43.

The CO issued a Final Determination ("FD") on May 10, 1994, denying alien labor certification. AF 59. The CO asserted that Employer failed to demonstrate that the requirements of the job opportunity are those normally required or that they arose from business necessity. AF 55. Additionally, the CO claimed that a statement from the Employer was never received although it was referenced in Employer's attorney's letter as providing an explanation of the business necessity for the Master's degree requirement and the other special requirements. AF 56. The CO also found that the AT&T contracts supported an argument that four or five requirements are customary but not eighteen as required in the job advertisement. Id. The other advertisements for software engineers also supported the argument that four or five requirements are customary because the advertisements ranged from 2 to 10 requirements with an average of four. Id. The CO found the Master's degree requirement acceptable based upon the SVP but asserted that the Employer had "failed to document that a U.S. applicant with a Bachelor's degree and experience in the required areas would be unable to perform the job . . . ." AF 55.

The CO also dismissed Employer's "rebuttal in the alternative" as unacceptable. Id. Despite Employer's offer to amend and readvertise if the business necessity rebuttal failed, the CO averred that he offered Employer a choice of one or the other but not both. Therefore, since Employer rebutted with evidence of the business necessity of the requirements and did not choose to initially amend and readvertise the position, it cannot now offer to amend and readvertise. Id. The CO reasoned that:

> [i]t does not seem feasible that an employer's job offer includes requirements which are both absolutely essential to the job to be performed yet on the other hand are so unnecessary that they can be deleted or amended and the job still be performed without it. Id.

Employer then filed a Motion to Reconsider and Request for Review of Denial of Alien Labor Certification on June 3, 1994. AF 89. Employer asserted in its Motion to Reconsider that it was a harmless error that Employer's statement did not reach the CO with its rebuttal and that this statement adequately justified the business necessity of the job requirements. Id. The CO denied the Motion to Reconsider on August 2, 1994.

DISCUSSION

The main issues in this case are whether Employer has demonstrated business necessity for the numerous special requirements in its job advertisement and, if not, has Employer shown a willingness to readvertise such that the CO must allow it this option. Under the Act, employers must describe the job in question without any unduly restrictive requirements. 20 C.F.R. §656.21(b)(2). The job requirements must be those normally required for the job in the United States and defined in the Dictionary of Occupational Titles ("DOT"). §656.21(b)(2)(I)(A)(B). If the employer cannot document that the requirements are those normally required or as defined in the DOT, then the employer must establish business necessity. Id.

The CO found that Employer's statement of business necessity was not in the rebuttal. AF 82. Employer attached a copy of Employer's statement to its Motion To Reconsider and asserted that its records indicated that the statement was sent with the original rebuttal. AF 89. The record indicates that Employer's rebuttal was filed on May 6, 1994. AF 54. The record contains two copies of the statement which were attached to the Motion to Reconsider. One is hand-dated May 20, 1994. AF 69. The other statement has a typewritten date of April 29, 1994, which is in a type different from that which appears in the text of the document. AF 65. The CO correctly determined that the statements were not submitted with the rebuttal. AF 56. The CO properly denied the Motion to Reconsider. The contents of the Statements cannot be considered on review. Anjunman Arts Academy, 94-INA-303 (May 30, 1995).

Employer can demonstrate business necessity by producing evidence that "the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer." Mr. and Mrs. Blumberg, 94-INA-244 (July 19, 1995)(citing Information Systems, 88-INA-82 (Feb. 9, 1989)(en banc)). The CO found that Employer did not demonstrate business necessity for the special requirements in the job application. AF 81.

We agree that the Employer did not establish the business necessity of the special requirements. As indicated, Employer's rebuttal did not include Employer's statement of business

necessity. The other evidence included Employer's attorney's letter of rebuttal, a letter from AT&T's technical staff, two contracts between AT&T and Employer, and various advertisements for data processing professionals. As the CO stated, this evidence establishes that four or five requirements are customary but not the full eighteen in the application. See AF 82. Accordingly, Employer has not demonstrated business necessity for all of the special requirements.

However, Employer in "Rebuttal in the Alternative," stated that if "the requirements have not been justified, the employer is willing to amend the application as suggested in your NOF and readvertise. " AF 52. The CO refused to allow Employer to readvertise. AF 55. The CO erred in this finding. The Board has held that when an employer expresses a willingness to readvertise in its rebuttal, the employer must be allowed the opportunity to readvertise as an employer cannot know whether its rebuttal evidence will be persuasive,. A. Smile, 89-INA-1 (March 6, 1990); Century 21 Construction Corp., 93-INA-192 (Oct. 24, 1994); E.M. Warburg, Pincus & Co., Inc., 93-INA-343 (January 26, 1995); Mr. and Mrs. Blumberg, 94-INA-244 (July 19, 1995); Rosemblum/Harb Architects, 94-INA-525 (March 29, 1996).

Accordingly, we vacate the F.D. and remand this case to the CO in order that the Employer be given the opportunity to modify the job requirements as provided in the NOF and readvertise the position in accordance with the regulations.

ORDER

The Certifying Officer's denial of labor certification is hereby vacated, and the case is REMANDED to the Certifying Officer for further proceedings consistent with this decision.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge